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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case No. 08-13555 (JMP)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

- - - - -x

United States Bankruptcy Court  
One Bowling Green  
New York, New York

June 6, 2011  
2:00 PM

B E F O R E:  
HON. JAMES M. PECK  
U.S. BANKRUPTCY JUDGE

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**MATTER re Status Conference**

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**Transcribed by: Linda Ferrara**

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P R O C E E D I N G S

THE COURT: Be seated, please. Good afternoon. This is the continued status conference in connection with a form of order. I'm just going to ask whether there have been any developments since we were last together on May 9 that might resolve the matters that are before the Court at the moment?

MR. MAGUIRE: Your Honor, Bill Maguire for the trustee. There have been no developments, Your Honor.

THE COURT: Okay. What I am going to do is provide my bench ruling. It will probably take about twenty-five minutes or so. I've prepared it in writing and so I am going to read it into the record. I did not intend to convert it into a written opinion but I'll discuss with the parties at the end whether or not in lieu of that, a transcript of today's hearing can simply be posted on the docket for those parties who are not present.

This ruling resolves remaining disputes regarding the content of the orders contemplated by the Court's 60(b) opinion issued on February 22, 2011. That opinion dealt with motions brought by LBHI, the committee and the SIPA trustee for relief under 60(b) with respect to the sale orders entered in these cases on September 20, 2008 and a cross-motion by Barclays to enforce those sale orders.

The opinion also adjudicated certain counts of related adversary proceedings that arose out of the same

1 subject matter as the 60(b) motions. The formulation of orders  
2 consistent with the opinion has turned out to be much more  
3 protracted and complicated in exercise than originally  
4 expected, in part due to the great complexity of the subject  
5 matter and the large sums at issue.

6 But the Court also believes that the vigorous disputes  
7 regarding the form of the proposed orders may have been  
8 motivated by a desire to achieve what in substance is  
9 reconsideration of certain determinations in the opinion under  
10 the benign guise of disputes over the substance of these  
11 orders.

12 In accordance with the Court's directions set forth in  
13 the opinion, the parties submitted separate proposed forms of  
14 order denying each of the 60(b) motions resolving those counts  
15 of each of the adversary complaints impacted by denial of these  
16 motions and granting in part and denying in part the Barclays  
17 motion to recover disputed assets.

18 Letters submitted to the Court highlighted the  
19 conflicting views of the parties as to disputed issues and  
20 their thoughts as to the most appropriate way to reflect and  
21 interpret the holdings in the opinion.

22 On April 11, 2011, the parties appeared at a chambers  
23 conference to discuss various disagreements between the SIPA  
24 trustee and Barclays regarding the content of the proposed  
25 orders. In accordance with procedures and deadlines

1 established at that chambers conference, on April 28, 2011, the  
2 SIPA trustee and Barclays submitted memoranda in support of  
3 their respective positions relating to the proposed forms of  
4 order. Each of them submitted a reply memorandum of May 4,  
5 2011. And all parties to the 60(b) litigation appeared for a  
6 status conference and oral argument on May 9, 2011.

7 At oral argument, counsel for the SIPA trustee  
8 Barclays informed the Court that they had succeeded in  
9 resolving their dispute concerning the amount of clearance box  
10 assets that Barclays is to receive. Specifically, I stated on  
11 the record that parties agreed that "the amount of the  
12 undelivered clearance box assets can be set in an order that  
13 will specify the payment by the trustee to Barclays of 1.1  
14 billion dollars and that there will be no other payment of any  
15 kind."

16 The parties also confirmed their substantial agreement  
17 that the total amount of margin assets held by Barclays was  
18 2.101 billion dollars. The Court's understanding is that as of  
19 May 9, 2011, a difference of approximately 80 million dollars  
20 remained in the parties' calculations of these margin assets  
21 and they appeared confident as to their ability to reach a full  
22 and final resolution that will precisely confirm the amount of  
23 the margin assets held by Barclays.

24 In addition, as a result of statements from the bench  
25 explaining the reasons for the reference in the opinion to

1 margin assets in connection with the so-called asset scramble,  
2 counsel for the SIPA trustee indicated that he was satisfied  
3 with the clarity of that explanation and withdrew his request  
4 for a provision in the order that would amend the opinion to  
5 remove margin assets from the list of additional asset  
6 categories identified during the asset scramble.

7 Finally, counsel for the parties confirmed on the  
8 record that they had reached an understanding regarding  
9 procedures for future financial reporting by the SIPA trustee  
10 that would permit Barclays to monitor its potential claim to  
11 the Rule 15(c) (33) assets without imposing undue burdens on the  
12 SIPA trustee, thereby ending disagreements regarding that  
13 aspect of the order.

14 The three remaining issues in dispute all relate to  
15 the margin assets. These are (1) whether the award of margin  
16 assets to the SIPA trustee applies to government securities,  
17 (2) whether Barclays may claim an offset for certain short  
18 positions or whether these were assumed by Barclays under the  
19 terms of the asset purchase agreement and/or the clarification  
20 letter and (3) whether the SIPA trustee is entitled to  
21 prejudgment interest and if so, what is the appropriate  
22 interest rate and commencement date to use for the calculation  
23 of interest.

24 The Court will address each of these issues in turn,  
25 starting with the government securities question that surfaced



1 as an issue for the first time after issuance of the opinion  
2 during vetting by the parties of the form of order.

3 In the opinion, the Court denied Barclays motion to  
4 recover "margin assets related to exchange traded derivatives."  
5 Despite this clear holding, Barclays' proposed order seeks to  
6 exclude approximately 1.5 billion dollars of margin assets that  
7 were held in the form of government securities with a maturity  
8 of more than three months.

9 Barclays bases this carve-out on the Court's stated  
10 understanding at the trial and in the opinion that "there was  
11 no Lehman cash going to Barclays." Barclays' focus is  
12 particularly on that aspect of the opinion in attempting to  
13 limit the relief to cash and cash equivalents, noting that the  
14 term cash equivalents excludes government securities with  
15 maturities greater than ninety days. In effect, Barclays is  
16 seeking a major change in the relief afforded in the opinion by  
17 means of language in an implementing order.

18 To be sure, the opinion references as an important  
19 factor in the Court's decision the various representations on  
20 the record at the sale hearing that no Lehman cash was going to  
21 Barclays. As the Court pointed out during oral argument,  
22 however, Barclays did not try to separately classify the margin  
23 assets and did not raise the issue of its alleged entitlement  
24 to long term government securities at trial.

25 Based on proceedings during the thirty-four day trial,

1 the Court concluded that the margin assets consist of LBI  
2 property used to support trading conducted by LBI on its own  
3 behalf and on behalf of its customers and affiliates. As  
4 counsel to the SIPA trustee argued, the trial "was a fight  
5 about margin and it was very clearly about all the margin."

6 That is clearly a correct statement and Barclays never  
7 sought during the trial to distinguish the treatment of margin  
8 based on the maturity date of the underlying securities. In  
9 the opinion, the Court recognized the two subparts of the APA's  
10 definition of excluded assets that independently encompassed  
11 the margin assets. Clause B excludes all cash, cash  
12 equivalents, bank deposits or similar cash items while clause N  
13 excludes all assets primarily related to the IND business and  
14 derivatives contracts. All assets is a broad classification  
15 that necessarily includes government securities.

16 Additionally, the opinion recognizes the clarification  
17 letters carry forward of the asset purchase agreement's  
18 exclusion of cash from the transaction and the very clear  
19 representations at the sale hearing that Barclays would not be  
20 taking any Lehman cash.

21 Specifically, paragraph 1(c) of the clarification  
22 letter provides in relevant part that "except as otherwise  
23 specified in the definition of purchased assets, excluded  
24 assets shall include any cash, cash equivalents, bank deposits  
25 or similar cash items."

1           The opinion also notes that the clarification letter  
2 further specified that although LBI's government securities  
3 trading operations were part of the business sold to Barclays,  
4 the government securities themselves were excluded from the  
5 sale. Indeed, in its memorandum filed in support of its  
6 proposed orders, Barclays recognizes that in certain places the  
7 Court's opinion appears to go beyond the no cash limitation and  
8 appears to hold that all ETD margin assets were excluded from  
9 the sale.

10           That exclusion of all ETD margin assets is the proper  
11 reading of the opinion. The opinion, for the reasons stated  
12 holds that the SIPA trustee is entitled to all of the margin  
13 assets and Barclays is not entitled to receive or retain that  
14 portion of the margin assets held in the form of government  
15 securities with maturity of more than three months.

16           There is a subsidiary issue that was also argued on  
17 May 9 involving clearing funds. Barclays claims that the order  
18 should provide for the identification and transfer to Barclays  
19 of some 171 million dollars of clearing funds on deposit at the  
20 OCC and an undetermined amount of residual clearing funds on  
21 deposit at the CME. Clearing funds are margin assets by  
22 another name. They are deposits that clearing corporations  
23 require their members to deposit into a single pool to secure  
24 all obligations of all clearing members.

25           LBI's clearing funds on deposit at the OCC and any

1 residual clearing funds on deposit at the CME apparently  
2 consistent of government securities. Barclays bases its claim  
3 to LBI's clearing funds on the Court's holding that Barclays is  
4 entitled to those margin assets that customers were required to  
5 deposit and that were "held for the benefit of customers."

6 In the opinion, the Court explained that "various  
7 regulations and rules require customers to deposit collateral  
8 with their broker-dealer or with their futures commission  
9 merchant to support trading of futures and options contracts."  
10 and that "This collateral, which is deposited by customers with  
11 a broker-dealer or futures commission merchant and held for the  
12 benefit of customers constitutes the property that may be held  
13 to secure obligations under the exchange trade of derivatives."  
14 Barclays argues that because clearing funds like customers  
15 deposits are funds that various regulations and rules require  
16 to support trading of futures and options contracts on behalf  
17 of customers, the Court should order all such funds transferred  
18 to Barclays.

19 The Court agrees with the SIPA trustee's arguments  
20 that clearing funds are not comparable to customer deposits and  
21 are virtually indistinguishable from other margin assets. The  
22 clearing funds were specifically excluded from the sale by  
23 virtue of the exclusion of all cash, cash equivalents, bank  
24 deposits, or similar cash items and the clarification letters  
25 specific exclusion of government securities.

1 In addition, and perhaps most importantly, the  
2 clearing funds are LBI property and not property deposited by  
3 customers. Accordingly under the opinion, Barclays is not  
4 entitled to any of the clearing funds.

5 I'll now address the setoff issue. Barclays contends  
6 that "To the extent the Court is going to order Barclays to  
7 return margin assets to the trustee, it must also address the  
8 extent to which Barclays is entitled to an offset or lien, or  
9 similar right compensate it for liabilities it assumed and paid  
10 as consideration for acquiring those margin assets."

11 Barclays bases this alleged setoff right on the  
12 consideration it provided under the transfer and assumption  
13 agreement which I'll call for these purposes the TAA and  
14 Section 550 of the Bankruptcy Code. As the SIPA trustee points  
15 out, this is a new argument that appears to be inconsistent  
16 with positions taken by Barclays at trial. The TAA provided  
17 that Barclays acquired all rights and obligations with respect  
18 to LBI's accounts at the OCC as of the closing of the sale  
19 transaction. Barclays was to assume all of LBI's long and  
20 short positions at the OCC and such rights and obligations  
21 included all margin deposits in those accounts.

22 In the opinion, the Court stated that because the TAA  
23 never was presented to the Court, it "cannot be dispositive to  
24 the parameters of the deal that the Court approved." Barclays  
25 contends that in this respect, the opinion has the effect of

1 voiding the TAA at least insofar as the TAA on its face  
2 transferred all margin deposits to Barclays.

3 But Barclays is stretching when it claims that the TAA  
4 Was effectively voided. The TAA was but one of the agreements  
5 touching the same subject matter and a side agreement that was  
6 never approved. The trial made clear that the APA and the  
7 clarification letter were the key documents that governed the  
8 acquisition and under these documents and the proof presented  
9 at trial, Barclays agreed to acquire both long and short  
10 positions. These linked positions may not be separated now.

11 Barclays attempt to use Section 550(a) of the  
12 Bankruptcy Code is misplaced because no transfer was avoided  
13 within the meaning of that section of the Bankruptcy Code.  
14 Barclays was unable to establish its claims for the margin  
15 assets but that is hardly the same as the avoidance of a  
16 transfer into one of the avoiding powers of the bankruptcy  
17 code.

18 Counsel to Barclays has argued that requiring Barclays  
19 to assume the OCC accounts without the margin will take away  
20 from Barclays "the quo for the quid that was being negotiated"  
21 as part of the TAA.

22 However, as was pointed out by counsel to the trustee,  
23 that very issue was tried before the Court at great length.  
24 The Court specifically rejected Barclays' arguments and the  
25 testimony of its expert witness that no rational purchaser

1 would undertake a deal of this kind without the margin assets  
2 and awarded the margin assets to the trustee.

3 Barclays has maintained on a consistent basis that it  
4 acquired both long and short positions and has not shown in its  
5 recent submissions that it is entitled to any setoff with  
6 respect to its obligation to return the margin assets.

7 I'll now turn to the question of prejudgment interest.  
8 The trustee seeks prejudgment interest on the margin assets at  
9 the nine percent interest rate applicable in New York pursuant  
10 to the following state law claims included in his adversary  
11 complaint. Counts Two and Three seeking declaratory judgment  
12 under 28 U.S.C. Section 2201 that the margin assets remain  
13 property of the LBI estate and that the trustee is entitled to  
14 the return of the cash already transferred to Barclays, Count  
15 Eleven for breach of contract and Count Twelve for conversion,  
16 money had and received.

17 Pursuant to a stipulation known as the adversary  
18 complaint stipulation regarding certain claims made in the  
19 adversary complaints filed by LBHI, the trustee and the  
20 creditors committee, the parties agreed among other things,  
21 that certain claims in the trustee's adversary complaint  
22 including Counts Two and Three will be resolved in conjunction  
23 with the resolution of the 60(b) motions. And that other  
24 claims including Counts Eleven for breach of contract and Count  
25 Twelve for conversion would be deferred for further

1 adjudication.

2 The trustee argues in his reply memorandum that it is  
3 mandatory for the Court to award prejudgment interest on his  
4 claims at the New York statutory rate of nine percent under  
5 C.P.L.R. Sections 5001(a) and 5004. At oral argument, however,  
6 the trustee indicated that it was within the Court's discretion  
7 to award interest at the New York statutory rate in connection  
8 with his declaratory judgment claims and mandatory only with  
9 respect to the conversion claims.

10 The trustee is not entitled to prejudgment interest in  
11 the value of the margin assets at the New York statutory rate.  
12 While the 60(b) trial required the Court to review and  
13 interpret the APA, the clarification letter, and other sale  
14 documents, the Court was dealing with and presiding over what  
15 at its core is a bankruptcy dispute over the proper  
16 interpretation of documents that were all drafted post-petition  
17 in relation to sale orders, not a breach of contract or a  
18 conversion claim under state law.

19 The parties agreed in the adversary complaint  
20 stipulation that the breach of contract and conversion claims  
21 would be deferred and such claims were not directly presented  
22 to the Court. Furthermore, while the parties stipulated that  
23 the trustee's declaratory judgment claims would be resolved in  
24 conjunction with the 60(b) motions, such claims are not state  
25 law based.



1           The applicable New York State prejudgment interest  
2     rate is particularly high relative to current market rates and  
3     to apply that rate would greatly enhance the estate's recovery  
4     while effecting a penalty as to Barclays.

5           This was a good faith business dispute and the  
6     objective in establishing an appropriate interest rate should  
7     be reasonable compensation to the estate for the period that it  
8     did not have possession and control of the margin assets and  
9     the ability to manage them.

10          The Court has discretion to award the trustee  
11     prejudgment interest on his bankruptcy claims. As noted by my  
12     colleague, Judge Glenn in his decision in Mikhail v. Boulder  
13     Capital, LLC in the matter of In Re: 1031 Tax Group, LLC 439 BR  
14     84, Courts in the Second Circuit and in this district have  
15     recognized that the award of prejudgment interest is  
16     discretionary and should be awarded unless there is a sound  
17     reason to deny it. In exercising such discretion, the Court  
18     should consider among other things, the need to fully  
19     compensate the wronged party for actual damages suffered and  
20     both the fairness and the relative equities of the award.  
21     While there is a reference rate for post-judgment interest,  
22     there is no fixed standard for the award of prejudgment  
23     interest.

24          Because Barclays has had the benefit of holding margin  
25     assets valued at approximately 2.1 billion dollars since the

1 date of their transfer to Barclays, the Court finds the  
2 prejudgment interest should be calculated from the date of  
3 transfer as compensation for the loss of the estate's  
4 possessory interest in this property and the ability to earn a  
5 return in connection with investing those assets for the  
6 benefit of creditors.

7 Accordingly, prejudgment interest should be calculated  
8 from the closing date, September 22, 2008, the date the margin  
9 assets were transferred to Barclays.

10 Determining an appropriate interest rate is also  
11 within the discretion of the Court. Upon weighing the facts  
12 and circumstances of this case, and for reasons noted earlier,  
13 the nine percent New York Statutory rate is deemed too high and  
14 employing that rate would be excessive under the circumstances.

15 Conversely, the federal judgment rate which was only  
16 1.69 percent at the time of the transfer is too low a rate of  
17 return and is not adequate to fully compensate the LBI estate  
18 for the loss of economic opportunities associated with  
19 management of the margin assets.

20 A rate between these two extremes is a more suitable  
21 measure of a reasonable prejudgment interest rate under the  
22 circumstances presented. The Court in exercising its  
23 discretion concludes that it would be most appropriate to  
24 derive an interest rate that is consistent with a benchmark  
25 from the credit markets and that is based on the prime rate

1 that was applicable at the time of the closing.

2 According to statistics published by the Board of  
3 Governors of the Federal Reserve, which the Court has reviewed,  
4 the bank prime loan interest rate on September 22, 2008 was  
5 five percent. Accordingly, the trustee shall be entitled to an  
6 award of prejudgment of interest at the rate of five percent  
7 with interest to accrue from September 22, 2008, the date of  
8 the transfer of the margin assets to Barclays to the date of  
9 entry of judgment. Thereafter, interest shall accrue with the  
10 then applicable post-judgment interest rate.

11 The trustee and Barclays shall submit an agreed order  
12 that incorporates this bench ruling and all relevant agreements  
13 between the parties concerning the form of the order. All  
14 orders including those submitted by LBHI and the committee  
15 shall be docketed on the same date. I will note that I have  
16 those orders in chambers that I have just referenced and unless  
17 there are changes to the forms of order to be proposed by  
18 counsel for either the committee or LBHI, those are the orders  
19 that I will enter. That's the ruling of the Court.

20 My only question to the parties is whether we have  
21 more business today to discuss. Mr. Maguire, did you have  
22 something?

23 MR. MAGUIRE: I have nothing, Your Honor.

24 THE COURT: Okay. I'll simply ask that counsel order  
25 a copy of the transcript of these proceedings and docket them

1 on the record.

2 MR. SCHILLER: We have reached an understanding with  
3 trustee's counsel. Jonathan Schiller for Barclays, Your Honor,  
4 excuse me. And we'll add that to our order about the parties  
5 wish a thirty-day period to resolve stay and bonding issues  
6 pending appeal, Judge. And we've agreed on that because we  
7 need more than the automatic fourteen days. Well include that  
8 in the order for Your Honor.

9 THE COURT: Okay. I'll see whether or not I'll  
10 actually approve that. Why should we agree on thirty days?  
11 This case has been pending for a year and a half.

12 MR. SCHILLER: We've made a proposal to them on how to  
13 handle the bonding issues and they're considering that and they  
14 thought that that was an adequate period of time for us to  
15 resolve that and avoid litigating the stay and bonding issues.

16 THE COURT: I am certainly not going to stand in the  
17 way of progress but the nature of the relief granted in the  
18 opinion has been well known to the parties for a very long  
19 time, at least since February and this is now June. I don't  
20 understand why the parties need that much time to deal with the  
21 bonding issue or why they haven't discussed it earlier but I  
22 will certainly consider the language when I see the order.  
23 We're adjourned.

24 (Whereupon these proceedings were concluded at 2:28 p.m.)

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I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Barclays is not entitled to any of the clearing funds	3	13
Barclays is not entitled to any setoff with respect to its obligation to return the margin assets	3	15
Trustee shall be entitled to an award of prejudgment of interest at the rate of five percent with interest to accrue from September 22, 2008	5	19

C E R T I F I C A T I O N

I, Linda Ferrara, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

Linda Ferrara

Digitally signed by Linda Ferrara  
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